

1 UNITED STATES BANKRUPTCY COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 In re ) Bankruptcy Case  
4 MARY JEW LEUNG, ) No. 97-35137SCDM  
5 ) Chapter 7  
6 Debtor. )  
7 AT&T UNIVERSAL CARD SERVICES CORP., ) Adversary Proceeding  
8 Plaintiff, ) No. 98-3047DM  
9 v. )  
10 MARY JEW LEUNG, )  
11 Defendant. )

12 MEMORANDUM DECISION

13 I. Introduction

14 A trial was held on the complaint of AT&T Universal Card  
15 Services Corp. ("Plaintiff") against defendant Mary Jew Leung  
16 ("Defendant") on January 15, 1999. Plaintiff appeared and was  
17 represented by Anne L. Keck, Esq.; Defendant appeared in propria  
18 persona, and was joined during the trial by counsel Daniel Bosis,  
19 Esq.

20 After presentation of oral testimony and documentary  
21 evidence, and the arguments of counsel, the court took the matter  
22 under submission. For the reasons set forth below, the court has  
23 determined that Defendant's obligations to Plaintiff are  
24 dischargeable in her Chapter 7 case and will enter judgment in her  
25 favor.

26 II Discussion

27 This is one of many cases that come before the court brought  
28

1 by Plaintiff and other major credit card issuers, seeking a  
2 determination of nondischargeability for credit card obligations  
3 incurred by Chapter 7 debtors prior to their filing bankruptcy.  
4 Once again in this case the court has been called upon to consider  
5 the controlling authorities on point and to apply the principles  
6 set forth in those authorities to the facts presented.

7       Currently the law regarding credit card dischargeability  
8 issues in the Ninth Circuit appears to be governed by a trio of  
9 circuit court decisions, supplemented by a decision of the  
10 Bankruptcy Appellate Panel. The critical cases are the following.  
11 In re Eashai, 87 F.3d 1082 (9th Cir. 1996), which dealt  
12 specifically with credit card kiting, but as a general rule  
13 adopted a "totality of the circumstances" theory whereby the  
14 bankruptcy court should infer the existence of an intention not to  
15 pay a credit card debt if the facts and circumstances of a  
16 particular case present a picture of deceptive conduct by the  
17 debtor. 87 F.3d at 1087.

18       In Eashai the court relied heavily on the seminal Bankruptcy  
19 Appellate Panel decision In re Dougherty, 84 B.R. 653 (9th Cir.  
20 BAP 1988). From the Dougherty case comes a nonexclusive list of  
21 twelve factors to be considered in determining the debtor's  
22 intent.<sup>1</sup> Eashai involved a credit card kiter with a duty to  
23 disclose his intention not to pay. Despite the specifics of the  
24 case before it, the court stressed that it was not actual fraud  
25 simply to make a minimum payment with a cash advance from another  
26 credit card. Instead, such conduct on the part of the debtor must  
27 be coupled with lack of intent to repay the debt; that lack of  
28 intent is determinable from consideration of the Dougherty

1 factors. 87 F. 3d at 1087.

2 Following Eashai, the Ninth Circuit decided Anastas v.  
3 American Savings Bank (In re Anastas), 94 F.3d 1280 (9th Cir.  
4 1996). There the court directed three essential inquiries to  
5 determine whether credit card debt would be nondischargeable:

6 1. Did the cardholder fraudulently fail to disclose his  
7 intent not to repay the credit card debt;

8 2. Did the card issuer justifiably rely on a representation  
9 by the debtor; and

10 3. Was the debt sought to be discharged proximately caused  
11 by the first two elements. 94 F.3d at 1283, citing Eashai 87 F.3d  
12 at 1088. Thus the bankruptcy court is directed to consider  
13 whether the debtor intentionally or with recklessness as to its  
14 truth or falsity, made a representation that he intended to repay  
15 the debt. The Dougherty factors should be considered, but from an  
16 overall point of view, the debtor's good faith must be examined.  
17 The "hopeless state of a debtor's financial condition should never  
18 become a substitute for an actual finding of bad faith." 94 F.3d  
19 at 1286.

20 Finally, in American Express Travel Related Services Company  
21 v. Hashemi (In re Hashemi), 104 F.3d 1122 (9th Cir. 1996), the  
22 court referred to Anastas and stressed that each time a credit  
23 card holder uses the credit card, a representation of intention to  
24 repay the debt is made. Intent to repay is a fact question based  
25 upon the Dougherty analysis. 104 F.3d at 1126, fn. 2.

26 As to justifiable reliance, the credit card issuer  
27 justifiably relies on a representation of intent to repay as long  
28 as the account is not in default and initial investigations into

1 the credit report do not raise red flags that would make reliance  
2 unjustifiable. Id.

3 III. Facts<sup>2</sup>

4 With the foregoing in mind the court turns to the facts of  
5 this case.

6 Defendant applied for credit from Plaintiff in August, 1992,  
7 at a time when she was not in default on any other credit cards.  
8 She had an income of approximately \$15,000 per year and was  
9 granted preapproved credit of \$3,500.

10 By February of 1997, Defendant's credit line with Plaintiff  
11 had increased to \$8,500 and in that month she incurred 14 charges  
12 for a total of \$272.50. In the following several months she made  
13 charges every month, the most of which (both in dollar amount and  
14 total number of charges) were during March and April, 1997 and  
15 which included a total of four \$1,000 convenience checks. As of  
16 May, 1997, Defendant's credit line with Plaintiff was increased  
17 from \$8,500 to \$10,200, and in that month she incurred an  
18 additional \$1,456 of charges, including \$1,000 convenience check.  
19 Beginning in June, 1997, her charges dropped below \$1,000 per  
20 month, except during July when they totaled \$1,197, including a  
21 \$1,000 convenience check.

22 During every month until October, 1997, Defendant paid the  
23 minimum amount due to Plaintiff per month. At least some of the  
24 minimum payments were made by cash advances from other credit  
25 cards; some of the cash advances made to her were used to make  
26 minimum payments on one or the other of two credit card accounts  
27 she maintained with other issuers. None of the charges Defendant  
28 made on Plaintiff's card were for extravagances or significant

1 luxuries. In general the purchases were for necessities,  
2 educational materials, miscellaneous personal expenses, necessary  
3 repairs and medical expenses or veterinarian or pet related  
4 charges.

5 Defendant, who was experienced in bookkeeping matters and  
6 other office work, was employed on a contract basis from time to  
7 time during the subject months, and obtained full-time employment  
8 in August, 1997. Although she expected that employment to be  
9 permanent, it terminated by October of 1997. By then she had no  
10 further credit available to her and was forced to file Chapter 7  
11 bankruptcy on November 7, 1997.

12 First the court must determine if Defendant's conduct  
13 resembles that of Mr. Eashai, a consummate credit card kiter.  
14 There the court distinguished the kiter from someone trying to  
15 make ends meet (including minimum credit card payments), through  
16 use of an another card:

17 Clearly it is not actual fraud simply to make a minimum  
18 payment with a cash advance from another credit card. This  
19 action on the part of the debtor must also be coupled with a  
20 lack of intent to repay the debt.

21 87 F.3d at 1089-1090. The court pointed out that "... a credit  
22 card kiter is easily distinguishable from a bad luck debtor. A  
23 credit card kiter manipulates the system to gain money, property,  
24 and services with no intention of ever paying for them." 87 F.3d  
25 at 1090.

26 In order to consider intent to deceive, the Dougherty factors  
27 are considered. Here those factors weigh in favor of the  
28 Defendant. Taking several of them together, although the  
Defendant made a fair number of charges and some of them on the

1 same day, in general they were small and for normal, non-luxurious  
2 or non-extravagant purposes. They were all made within credit  
3 card limits and at a time when the debtor was making minimum  
4 payments. There is no pattern of credit card kiting.

5 Although some smaller charges were made as bankruptcy became  
6 more imminent, the bulk of Defendant's charges on Plaintiff's  
7 cards were made several months prior to bankruptcy. There is no  
8 evidence that Defendant consulted with any attorney in connection  
9 with these charges. While her employment prospects were  
10 questionable at times, she was actively looking for employment and  
11 the fact that she did obtain a job believed to be permanent  
12 operates in her favor. Finally, the Defendant did not make any  
13 sudden change in her buying habits nor, as stated above, purchase  
14 luxurious items.

15 Plaintiff is entitled to some balancing of the Dougherty  
16 factors in its favor, including the financial sophistication of  
17 the Defendant and the fact that she was clearly living on her  
18 credit cards during 1997. Nevertheless, the bulk of the Dougherty  
19 factors lead the court to find that there was no lack of intent to  
20 pay nor did the debtor Defendant demonstrate any bad faith as  
21 required by the Anastas court. To paraphrase from Hashemi, she  
22 did not try "... to have a last hurrah at [Plaintiff's] expense."  
23 104 F. 3d at 1126.

24 Neither was the Defendant reckless in her behavior. Although  
25 there were no "red flags" to alert Plaintiff to a problem (see  
26 Hashemi, 104 F.3d at 1126) and Plaintiff justifiably relied on the  
27 implied representation of intent to repay when the charges were  
28 made, there was no inherent falsehood in the representations.

1 Defendant intended in good faith to pay her debts to Plaintiff  
2 when she incurred them.

3 Plaintiff has not sustained its burden under 11 U.S.C.  
4 § 523(a)(2)(A) as required a preponderance of the evidence under  
5 Grogan v. Garner, 498 U.S. 279 (1991).

6 IV. Disposition

7 In view of the foregoing, Defendant is entitled to a judgment  
8 of dischargeability of all her obligations to Plaintiff, and is  
9 entitled to her costs. Counsel for Defendant should prepare a  
10 judgment consistent with this disposition and should comply with  
11 B.L.R. 9021-1 and B.L.R. 9022-1.

12 Dated: January 25, 1999

13 \_\_\_\_\_  
14 Dennis Montali  
United States Bankruptcy Judge

15 1. The factors will be discussed in detail, infra.

16 2. The following discussion constitutes the court's findings of  
17 fact and conclusions of law. Fed. R. Bankr. P. 7052(a).